STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS E. HOLTSCHLAG,

Defendant-Appellant.

UNPUBLISHED
March 27, 2003

No. 226715
Wayne Circuit Court
LC No. 99-4731-03

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA M. COLE,

Defendant-Appellant.

No. 227941
Wayne Circuit Court
LC No. 99-004731

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL BRAYMAN,

Defendant-Appellant.

No. 227942
Wayne Circuit Court
LC No. 99-004731

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 241661
Wayne Circuit Court
LC No. 99-004731

ERICK LIMMER,

Defendant-Appellant.

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

These consolidated appeals follow a jury trial that was conducted before the Wayne Circuit Court. Defendant Cole[1] was convicted of Involuntary Manslaughter, MCL 750.321; and two counts of Mixing a Harmful Substance in a Drink, MCL 750.436(1).[2] Defendant Cole was sentenced to consecutive terms of 7 to 15 years' imprisonment for the Involuntary Manslaughter conviction and 2 1/2 to 5 years' imprisonment for each Mixing a Harmful Substance in a Drink conviction. Defendants Holtschlag and Brayman were each convicted of Involuntary Manslaughter, MCL 750.321; and two counts of Mixing a Harmful Substance in a Drink, MCL 750.436(1). They were sentenced to consecutive terms of 5 years 9 months to 15 years' imprisonment for the Involuntary Manslaughter conviction and 2 1/2 to 5 years' imprisonment for the Mixing a Harmful Substance in a Drink conviction. Defendant Limmer was convicted of Accessory After The Fact to Manslaughter, MCL 750.505; Mixing a Harmful Substance in a Drink, MCL 750.436(1); Delivery/Manufacture of Marijuana, MCL 333.7401(2)(d)(iii); and Possession of GHB;[3] MCL 333.7403(2)(a)(v).[4] Defendant Limmer was sentenced to consecutive terms of 3 to 5 years' imprisonment for the Accessory After The Fact to Manslaughter conviction, 2 1/2 to 5 years' imprisonment for the Mixing a Harmful Substance in a Drink conviction, 2 to 4 years' imprisonment for the Delivery/Manufacture of Marijuana conviction, and 9 months to 2 years' imprisonment for the Possession of GHB conviction. We affirm in part and reverse in part.

I. Factual Background

On Saturday, January 16, 1999, defendants Holtschlag and Brayman picked up three young women, Samantha, Melanie, and Jessica and took them to defendant Limmer's Grosse Ile apartment to watch television and drink alcohol. Defendants Limmer and Cole were at the

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[1] On October 8, 1999, the trial court granted a motion to sever defendant Cole's trial and the case was tried before two separate juries.

[2] We note that MCL 750.436 was amended by 2002 PA 135, imd eff April 1.

[3] GHB stands for Gamma Hydroxybutyrate or Gamma Hydroxybutyric acid. GHB is listed in MCL 333.7212(1)(f) as a schedule 1 controlled substance.

[4] We note that Gamma Butyrolactone (GBL) turns into GHB when it is ingested. It is currently illegal to manufacture, deliver, or possess GBL in Michigan. MCL 333.7401b, as added by 2000 PA 302, imd eff October 16.

apartment when the girls arrived and provided each girl with a beer. Shortly thereafter, defendant Limmer gave the group a bag of marijuana and then went into his bedroom.

Later in the evening, defendant Cole asked the girls if they wanted anything more to drink and then went into the kitchen with defendants Holtschlag and Brayman. Melanie testified that she saw these three defendants in the kitchen smoking marijuana and talking. When defendants left the kitchen, defendant Holtschlag gave Samantha a Mountain Dew and defendant Brayman gave Melanie a Screwdriver. Samantha complained that her drink tasted "gross." Shortly after consuming these beverages, Samantha and Melanie passed out and began vomiting. Before passing out, Melanie recalled one of the boys asking if Samantha had a pulse. Both Melanie and Samantha had to be carried into the bathroom. They were placed on their sides to prevent choking.

After being apprised of the girls' conditions, defendant Limmer told the other defendants to clean up the mess made by the girls and sent defendant Holtschlag to purchase a vacuum and carpet cleaner at a nearby store. There was evidence that the girls appeared pale and that Samantha sounded like she was have trouble breathing. Jessica testified that defendant Limmer asked defendant Cole to check Samantha's pulse but that defendant Limmer would not let them call an ambulance. The two girls were sick for several hours before they were taken to the hospital. Defendant Limmer did not go with the other defendants and Jessica to the hospital. Rather, Jessica recalled that he stayed behind and repeatedly warned them not to mention being at his apartment. Defendant Brayman claimed that defendant Cole informed him right before they left for the hospital that he had drugged the girls.

When Samantha and Melanie arrived at the hospital, both were unconscious and Samantha was not breathing. In response to questioning by police and hospital personnel, defendants Holtschlag, Brayman, and Cole claimed they were at a party in Ecorse and did not say anything about drugs. In fact, these defendants drove with a police officer to show him where the alleged "Ecorse party" occurred. Samantha died as a result of her injuries and Melanie was in a coma for several hours. Blood and urine samples revealed high concentrations of GHB in the girls' systems. Several experts testified that the levels of GHB present were sufficient to cause Samantha's death and the symptoms experienced by Melanie.

Defendant Cole subsequently admitted to police that he went with defendant Limmer to purchase a substance from a man outside a gas station in Dearborn.[5] Upon returning to the apartment, defendant Cole stated that defendant Limmer poured twenty ounces of this substance into a glass container. He claimed that defendant Limmer told him that the substance would eat through a plastic container. Defendant Cole confessed to police that he literally poured this substance in all three of the girls' drinks. According to defendant Cole, defendants Brayman and Holtschlag were aware of this and acquiesced in the plan.

[5] The statements defendant Cole furnished to police were only presented to his jury.

I. Sufficiency of the Evidence

Defendants contend that there was insufficient evidence to sustain their convictions for mixing a harmful substance in a drink, involuntary manslaughter or accessory after the fact to manslaughter, and possession of GHB. After reviewing the record, we find that there was sufficient evidence to support defendants' convictions for mixing a harmful substance in a drink and possession of GHB. However, we conclude that there was legally insufficient evidence to support defendants' convictions for involuntary manslaughter and accessory after the fact to manslaughter.

In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

A. Mixing a Harmful Substance in a Drink

Defendants initially maintain that there was insufficient evidence to support their convictions for mixing a harmful substance in a drink.

At the time of trial, MCL 750.436(1) provided in pertinent part as follows:

> A person who willfully mingles a poison or harmful substance with a . . . drink . . . and who knows or should know that the . . . drink . . . may be ingested or used by a person to his or her injury, is guilty of a felony, punishable by imprisonment for not more than 5 years . . . .

1. Defendants Holtschlag and Brayman

Defendants Holtschlag and Brayman were convicted of this offense under an aiding and abetting theory. When a person aids or abets in the commission of a crime, that person may be convicted and punished the same as if he directly committed the offense. MCL 767.39; *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). A defendant may be convicted as an aider and abettor if: (1) the defendant or some other person committed the charged crime; (2) the defendant assisted in the commission of the crime by performing acts or offering encouragement; and (3) the defendant either intended the commission of the crime or knew that the principal had such an intent when he offered aid and encouragement. *Izarraras-Placante*, *supra* at 495-496.

On appeal, defendants Brayman and Holtschlag contend that they were unaware that defendant Cole placed a drug in the girls' drinks. However, the testimony revealed an established relationship among defendants. Defendants Holtschlag and Brayman would go to defendant Limmer's apartment to smoke marijuana and there was further evidence that they were

associated with defendant Cole. Moreover, defendants Holtschlag, Brayman, and Cole were seen talking in the kitchen before the drinks were served that caused Samantha and Melanie to lose consciousness. Expert witnesses testified that the symptoms displayed by Samantha and Melanie were consistent with the ingestion of a toxic concentration of GHB.

A jury could reasonably conclude from this evidence that defendants Holtschlag, Brayman, and Cole were talking about placing the GHB in the girls' drinks while they were in the kitchen. Moreover, a juror could question whether defendant Cole would secretly drug the drinks of the girls that came with his friends without telling his friends. A reasonable inference could further be made that defendants were trying to protect themselves by cleaning the apartment despite the fact that the girls were obviously sick. The elaborate story defendants Holtschlag, Brayman, and Cole, provided to police and hospital workers also supports the conclusion that they had a guilty state of mind. See *People v Dandron*, 70 Mich App 439, 442-445; 245 NW2d 782 (1976). To the extent defendant Brayman contends he was unaware of the fact that GHB/GBL could cause injury, we note that he testified during trial that he knew it was a mind-altering substance. See *People v Carmichael*, 5 Mich 10, 21 (1858). Thus, we find that sufficient evidence existed to convict defendants Holtschlag and Brayman of placing a harmful substance in the girls' drinks under an aider and abettor theory.

2. Defendant Cole

Defendant Cole asserts that the record fails to support a finding that he willfully placed a harmful substance in the girls' drinks because there was no evidence that he knew the substance was harmful. We note that the trial court defined a harmful substance to the jury as something that "can be used to cause death, injury or a disease in humans." In *Carmichael*, *supra* at 21, the Supreme Court determined that an injury resulted "[w]herever . . . there is a positive physical effect produced, and the poison administered operates to derange the healthy organization of the system, temporarily or permanently . . . ." Here, defendant Cole testified that he knew the substance would eat through plastic. He further admitted that when he tried a supposedly small amount of GHB/GBL, it caused him to vomit and pass out.[6] The fact that defendant Cole personally suffered physical side effects from ingesting GHB/GBL and knew its corrosive effects, provided sufficient evidence to support his conviction.

3. Defendant Limmer

Defendant Limmer argues that the prosecution failed to prove that there was any GHB in the beer that he handed Melanie. According to defendant Limmer, the fact Melanie opened the beer herself and did not immediately get sick is dispositive of this issue. A review of the record indicates that defendant Limmer handed Melanie a long-neck bottle of beer upon her arrival and that she only drank a few sips of it. While Melanie testified that she did not normally like the taste of beer, she described this beer as tasting "old or skunky." Experts testified that GHB is considered toxic in certain doses and that it will cause a drink to taste soapy or abnormal. Thus,

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[6] Defendant Cole explained to the police that he must have been given a lot of GBL, rather than a small amount, because he became sick. However, defendant Cole admitted to literally pouring GHB/GBL in the girls' drinks, with one drink getting more than the others.

the jury could conclude that Melanie did not become sick because she only drank a small amount of this beverage. Moreover, seven of the twelve beer bottles recovered from the apartment tested positive for GHB and GBL. Consequently, there was sufficient evidence to support the jury's conclusion that defendant Limmer gave a beer to Melanie containing GHB.

B. Possession of GHB

Defendant Limmer also asserts that there was insufficient evidence that he possessed GHB. According to defendant Limmer, the only evidence that connected the substance to him was the fact that he resided in the apartment. However, "[p]ossession may be either actual or constructive, and may be joint as well as exclusive." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). The essential issue is whether the defendant exercised dominion or control over the substance. *Id*. In this case, Melanie and Jessica testified that they did not see anything brought into the apartment. Furthermore, the apartment was leased in defendant Limmer's name and there was proof that he resided there. There was also evidence that defendant Limmer handed Melanie one of the beers that was laced with GHB. Thus, a reasonable juror could conclude that defendant Limmer possessed GHB.

Regardless, defendant Limmer claims that there is no proof that the substance was actually GHB, rather than the then legal substance GBL. Specifically, defendant Limmer alleges that the water added to the beer bottles to obtain samples would have converted the GBL into GHB. Indeed, several of the beer bottles obtained from the apartment tested positive for GHB and GBL. However, a careful review of the record reveals that Dr. Michael Robertson clearly testified that if GHB were added to the beer, which is acidic, it would either be partially or completely converted to GBL. He further explained that if GBL were put into a beer, it would remain GBL. Dr. Robertson stated that water is essentially neutral and would not affect the pH levels unless it was contaminated. While Dr. Duane Satzger testified that under *certain* conditions water could convert GBL into GHB, and that beer contained water, the jury could have chosen to believe Dr. Robertson's testimony and concluded that the substance originally placed in the beer bottles was GHB. See *Wolfe, supra* at 514-515; *Avant, supra* at 506. Accordingly, we find that there was sufficient evidence to support the jury's conclusion that defendant Limmer possessed GHB.

C. Involuntary Manslaughter

Defendants further argue that the evidence was insufficient to convict them of involuntary manslaughter or accessory after the fact to involuntary manslaughter.

While the penalty for involuntary manslaughter is set forth in MCL 750.321, the crime is actually defined in common law. *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001). Since 1923, the Supreme Court has defined involuntary manslaughter as:

> the killing of another without malice and unintentionally, but in doing some *unlawful act not amounting to a felony* nor naturally tending to cause death or great bodily harm, or in *negligently doing some act lawful in itself*, or by the negligent omission to perform a legal duty. [*People v Datema*, 448 Mich 585, 596-597; 533 NW2d 272 (1995), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923), emphasis added.]

As noted by the prosecution, the trial court in the instant case instructed, and the jury convicted, defendants Cole, Holtschlag, and Brayman under the gross negligence theory of involuntary manslaughter. However, the death in this case resulted from defendants' unlawful placement, or aiding and abetting in the placement, of a poison/harmful substance in a drink that they knew was likely to be ingested. Mingling a poison/harmful substance in a person's drink is clearly an act unlawful in itself and is in fact labeled a *felony* under MCL 750.436(1). Because mingling a harmful substance is an unlawful act, defendants could not be convicted of involuntary manslaughter under a theory of gross negligence. See *Datema, supra* at 596-597; *People v Beach*, 429 Mich 450, 477; 418 NW2d 861 (1988).

Moreover, because defendants Cole, Holtschlag, and Brayman were convicted of felonies, it would be impossible, as a matter of law, to find them guilty under the misdemeanor-manslaughter rule. While the prosecution argues that it is not required to prove negative elements of a crime, it fails to admit that it provided affirmative evidence that a felony was committed.[7] Accordingly, we find that that there was legally insufficient evidence to convict defendants Cole, Holtschlag, and Brayman of involuntary manslaughter. As a result, we also find insufficient evidence to sustain defendant Limmer's conviction as an accessory after the fact to this manslaughter. See *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999).

Defendants raise several arguments on appeal relating to their convictions for involuntary manslaughter and accessory after the fact to manslaughter. These issues are now moot based on our determination that the convictions were improper. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

II. Admission of Evidence

Defendants next raise several errors concerning the trial court's admission of evidence. Specifically, defendants claim that the trial court abused its discretion by admitting prior bad acts testimony and evidence concerning the commonly known effects of GHB/GBL. Defendant Cole further alleges that the trial court improperly permitted co-defendant Brayman to testify before his jury.

A trial court's decision to admit or deny evidence is reviewed on appeal for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). An abuse of discretion exists when an unprejudiced person, considering the facts before the trial court, would find no excuse for the ruling made. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "However, where decisions regarding the admission of evidence involve preliminary questions of law such as whether a rule of evidence or statute precludes admissibility, our review is de novo." *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Reversal is only warranted for the improper admission of evidence if it was prejudicial. MCL 769.26; *People v Crawford*, 458 Mich 376, 399-400; 582 NW2d 785 (1998).

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[7] Nevertheless, we note that in *People v Rode*, 449 Mich 912; 538 NW2d 671 (1995), our Supreme Court concluded that a person convicted of a felony was not entitled to an instruction under the misdemeanor-manslaughter rule.

A. Bad Acts Testimony

Defendants claim that the trial court improperly granted the prosecution's request to present other acts testimony. However, after reviewing the testimony presented, we do not find that any of these claims amount to reversible error.

At trial, Jodie Straight testified that defendant Holtschlag sold marijuana for defendant Limmer. She further claimed that she helped defendants Holtschlag, Brayman, and Limmer package marijuana at defendant Limmer's apartment. Ms. Straight also stated that she drank and smoked marijuana at defendant Limmer's apartment on occasion. Ms. Straight recalled defendant Limmer telling her that he had a close relationship with defendant Holtschlag because of the role he played in selling drugs for defendant Limmer. Ms. Straight also testified that defendant Limmer told her that he could get her any type of drug that she wanted.

1. Notice

Initially, defendants assert that the prosecution failed to provide reasonable notice of its intent to introduce the other acts evidence. According to defendants, the prosecution provided notice of its intent to introduce the evidence only one week prior to trial. While the prosecution listed Ms. Straight on its witness list and defendants were aware of the statements she made to police, defendants contend that this was not the notice contemplated by the rules of evidence. Rather, defendants assert that they should have been given actual notice well in advance of trial.

MRE 404(b)(2), provides that "[t]he prosecution . . . shall provide *reasonable* notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence." [Emphasis added]. The purpose of this rule is to ensure that: (1) the prosecution only seeks admission of relevant bad acts evidence; (2) the defendant has an opportunity to object and defend against such evidence; and (3) an adequate record is made to aid the trial court in rendering a ruling. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001).

The prosecution faxed the actual notice to defendants of its intent to present this evidence on January 25, 2000. MRE 404(b)(2) only requires *reasonable* notice and does not state the form that notice must take or that it needs to be provided *well before* trial. Considering the purposes enumerated in *Hawkins, supra*, it appears that the aims of MRE 404(b)(2) were met in this case because defendants were provided an opportunity to object to the evidence and the trial court was given an opportunity to reflect on the issue and make a reasoned ruling that the evidence was relevant. Accordingly, the prosecution provided reasonable notice to defendants as required under the rules of evidence.[8]

2. "Other Acts" Analysis

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[8] Defendant Cole has failed to establish that the prosecution presented any bad acts evidence against him. Consequently, we find that he was not entitled to notice.

In order to be admissible at trial, evidence must be relevant. MRE 402. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, evidence of other crimes or bad acts is generally inadmissible to prove an individual's propensity to act in conformity therewith. MRE 404(a); *Crawford, supra* 383. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident* when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

We evaluate the admission of other acts evidence by considering whether: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

The prosecution's stated rationale for the admission of the other acts evidence was to show knowledge and a scheme of doing things. Specifically, the prosecution alleged that the evidence showed that defendants Holtschlag and Brayman had befriended young girls in the past and took them to defendant Limmer's apartment to drink and smoke marijuana. Thus, the prosecution argued that the fact defendants Holtschlag and Brayman took Samantha, Melanie, and Jessica to the apartment on the night in question was not surprising. The prosecution further asserted that Jodie Straight's testimony would establish the type of relationship that existed among defendants and the fact that defendant Limmer, or "James Bond" as he was called, was the "tough-guy" of the group. According to the prosecution, the fact that defendants were in this type of relationship and shared these experiences would dramatically increase the probability that they were all aware that Samantha and Melanie were drugged on the night in question.

Evidence that shows knowledge or a scheme of doing things is recognized within MRE 404(b)(1) as being offered for a permissible purpose. "A proper purpose is a noncharacter purpose, one that does not risk impermissible inferences of character to conduct." *People v Ortiz*, 249 Mich App 297, 305; 642 NW2d 417 (2001). To convict defendants of aiding and abetting in the mingling of a harmful substance in a drink, the prosecution needed to prove that they were aware that a harmful substance was placed in the girls' drinks and that they encouraged this action in some fashion. Thus, the issue of whether defendants were aware of the presence of the GHB in the apartment and that someone placed it in the drinks was material. See *Crawford, supra* at 389-390.

Moreover, evidence that defendants Holtschlag and Brayman went to defendant Limmer's apartment to smoke marijuana was logically relevant because it showed that these defendants had an ongoing relationship involving the use of drugs. Similarly, testimony that defendants Holtschlag and Brayman helped defendant Limmer package marijuana at the

apartment was probative of the atmosphere in the apartment. The fact that defendant Limmer told Ms. Straight that he could provide her with any type of drug she desired was also relevant because it made it more likely that defendants had access to drugs besides marijuana.

Nevertheless, testimony that defendant Holtschlag actually *sold* marijuana was irrelevant to the charges against him. Unlike defendant Cole, defendant Holtschlag was not charged with the delivery/manufacture of marijuana. Evidence of the *actual sale of drugs* went beyond the prosecutor's stated purpose of showing the existing relationship among defendants and depicted defendant Holtschlag as a drug dealer or "bad man." Moreover, the fact that defendant Holtschlag sold marijuana would not make it more likely that he would assist defendant Cole in secretly drugging the girls' drinks. However, absent manifest injustice, the improper admission of evidence does not warrant a new trial. MCL 769.26; *Crawford*, *supra* at 399-400.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." C*rawford, supra* at 398. Testimony that Ms. Straight assisted defendants Holtschlag, Brayman, and Limmer in packaging marijuana at defendant Limmer's apartment was not unfairly prejudicial. Indeed, there was evidence presented that defendant Limmer provided the group with a bag of marijuana on the night in question. Moreover, testimony established that the girls went with defendants Holtschlag and Brayman to get marijuana before going to defendant Limmer's apartment. Thus, the majority of Ms. Straight's testimony was not significantly different from the drug activities that took place at the apartment that night. It is also important to note that Ms. Straight claimed she was never forced to drink or smoke marijuana and that the only drug she ever saw at the apartment was marijuana.

Further, Ms. Straight's testimony that she observed defendant Holtschlag selling marijuana one time was not so prejudicial that it "drowned the 'weaker sound' of the other evidence properly before the jury . . . ." *Id*. at 399. We also note that the trial court lessened any potential prejudice by providing a limiting instruction to the jury. As such, we do not find that the trial court's admission of this testimony amounted to reversible error.

B. Commonly Known Effects of GHB/GBL

Defendants maintain that the trial court improperly prevented them from questioning the prosecution's expert witnesses about the *public's general knowledge* of GHB/GBL and its effects. However, there is nothing on the record to indicate that the *general public's awareness* of GHB/GBL was within the expertise or realm of knowledge of these expert witnesses. The burden was on defendants, as the parties seeking admission of the testimony, to establish a proper foundation. *People v Burton*, 433 Mich 268, 304, n 16; 445 NW2d 133 (1989).

C. Co-defendant Brayman's Testimony

Defendant Cole claims that his substantial rights were prejudiced when the trial court permitted co-defendant Brayman to testify before both juries. We disagree. "[T]he decision to sever or join defendants lies within the discretion of the trial court." *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994); see also MCR 6.121(C). The Court in *Hana, supra* at 351, reaffirmed the use of dual juries as a partial form of severance and a way to allay the risk of prejudice in cases with multiple defendants. Severance is appropriate when defenses are so

antagonistic as to be considered mutually exclusive. *Id*. at 349-350.

The companion cases discussed in *Hana, supra*, present a situation similar to the instant case where both juries were permitted to hear a co-defendant's testimony. However, when error was alleged on appeal, the Supreme Court concluded that the defendants failed to show how they were restricted from presenting a defense or that their jury was exposed to evidence that would have been barred in separate trials. *Id*. at 359-360. The *Hana* Court also held that "[i]t is not dispositive that the evidence was presented here by counsel for a codefendant, rather than the prosecutor." *Id*. at 362.

After reviewing the record, it does not appear that defendants' theories of defense were so antagonistic as to be considered mutually exclusive or irreconcilable. *See id*. at 349-350. Defendant Cole *admitted* that he placed the substance in the girls' drinks but denied knowing that the substance was harmful. Whereas, defendant Brayman claimed he was unaware of defendant Cole's actions that night. Moreover, we find defendant Brayman's testimony concerning the events surrounding the night in question to be highly relevant. See *id*. at 362. Defendant Cole has also failed to establish that this evidence would not have been admissible against him in separate trials. See *id*. at 361. Accordingly, we find that defendant Cole's rights were not impeded when his jury was allowed to hear this testimony.

III. Jury Instructions

Defendants next raise several alleged instructional errors. However, after carefully reviewing the trial court's comments and instructions in context, we find no error.

This Court reviews de novo a defendant's claim of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *Aldrich, supra* at 124. It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

A. Directed Verdict

Defendant Holtschlag argues that the trial court improperly shifted the burden of proof by commenting to the jury about its ruling on defendant Limmer's motion for a directed verdict. He also claims that it was error for the trial court to discuss the existence, nature, and results of legal matters conducted outside the jury's presence. Because defendant Holtschlag did not object to this instruction at trial, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After reviewing the trial court's instructions in context, we find that the trial court simply informed the jury that there was insufficient evidence as a matter of law to allow some of the charges to go forward against defendant Limmer. In fact, the trial court specifically limited the

instruction to defendant Limmer and premised it with the fact that the prosecution had the burden of proof. The jury was instructed that each defendant should be considered separately and was given the standard instructions indicating that the trial court's comments, rulings, and instructions were not evidence. As a general rule, jurors are presumed to follow their instructions. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). We find that the instructions provided in the instant case were appropriately limited and did not impose the trial court's interpretation on the charges against defendant Holtschlag.[9] See *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

B. Mixing a Harmful Substance in a Drink

Defendant Cole asserts that the trial court's instruction concerning mingling of a harmful substance was improper because it omitted the phrase "to his or her injury." At the time of this offense, MCL 750.436(1) provided as follows:

> A person who willfully mingles a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product, or who willfully places a poison or harmful substance in a spring, well, reservoir, or public water supply, and who knows or should know that the food, drink, nonprescription medicine, pharmaceutical product, or water may be ingested or used by a person to his or her injury, is guilty of a felony, punishable by imprisonment for not more than 5 years . . . .

The trial court gave the following instructions to the jury concerning the lesser offense of mixing a poison or a harmful substance in a drink:

> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the defendant . . . voluntarily and intentionally placed, mingled a harmful substance in a drink being [GHB or GBL].
>
> Second, that a harmful chemical substance means a solid, liquid or gas that . . . can be used to cause death, injury or disease in humans.
>
> *Third, the defendant knew or should have known the drink may have been ingested or used by a person.*
>
> The prosecutor is not required to prove the defendant intended to cause Melanie . . . or Samantha . . . great bodily injury or death.
>
> The defendant must have had knowledge at the time of the act the substance used was indeed a poison or harmful substance. [Emphasis added.]

Defendant Cole claims that this was prejudicial error because his defense was that he was unaware that the amount of the GHB/GBL he placed in the girls' drinks would be ingested to

[9] Because an objection to the trial court's comments would have been futile, defendant Holtschlag has failed to establish that his trial counsel was ineffective for failing to object. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

their injury. However, a plain reading of the statute suggests that the Legislature intended that MCL 750.436(1) may be implicated whenever a poison or harmful substance is placed in a drink that a person knows may be ingested. See *People v Schumacher*, 240 Mich App 420, 427; 613 NW2d 348 (2000). The use of the phrase "may be ingested" indicates that neither ingestion nor injury is required pursuant to the statute. Moreover, the trial court defined a harmful substance to the jury as something that "can be used to cause death, injury or disease in humans." Thus, to convict defendant Cole of this charge, the jury needed to determine that he knew, or should have known, that the substance placed in the drink could cause death or injury to humans. Accordingly, we find that the trial court's instructions as a whole properly apprised the jury of the statutory requirements for this offense. See *Aldrich, supra* at 124.

IV. Prosecutorial Misconduct

Defendants further contend that a new trial is warranted as a result of the prosecutor's misconduct. Specifically, defendants allege that the prosecutor made improper use of the bad acts testimony and also made several other prejudicial remarks during closing argument. We disagree.

Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *Aldrich, supra* at 110. "Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Unpreserved constitutional error only warrants reversal if it is plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

"Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). It is further improper for prosecutors to resort to civil duty arguments that appeal to a jury's fears and prejudices. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). A civic duty argument injects issues into the trial that are broader than a defendant's guilt or innocence and encourages the jury to suspend its powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). However, "[a] prosecutor need not confine argument to the 'blandest of all possible terms,' but has wide latitude and may argue the evidence and all reasonable inferences from it." *Aldrich, supra* at 112.

A. Use of Other Acts Testimony in Closing Argument

Defendants claim that the prosecution improperly used the other acts evidence during closing argument. As concluded previously, the trial court properly admitted evidence that defendants Holtschlag, Brayman, and Limmer smoked and packaged marijuana at the apartment in response to defendants' lack of knowledge defense. "[A] prosecutor may comment about and suggest reasonable inferences from the evidence presented at trial." *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). After reviewing the prosecutor's comments in context, we do not find that he improperly used this evidence to suggest that defendants would secretly drug girls. Rather, the prosecutor argued that the relationship among defendants and the open environment at the apartment indicated that defendant Cole would have told the other defendants before he placed a drug in the girls' drinks. These were permissible comments from the

evidence properly presented at trial. While the prosecutor also commented on defendant Holtschlag's sale of marijuana for defendant Limmer, in light of the fact that the trial court ruled the evidence admissible, the prosecutor's reliance on that ruling could not amount to misconduct.

B. Closing Argument

1. Defendant Cole

Defendant Cole's argument on appeal concerning the prosecutor's comments during closing argument merely notes two statements and claims that they constituted plain error. During closing argument, the prosecutor read the following poem written by Samantha:

> I always thought that when it came I'd be ready for the end. By that time, I'd be resigned and tame. Death would appear a welcome friend.
> But what if I still want to live, still want to learn and grow?
> What if I still have gifts to give and I'm not yet ready to go?
> What if I'm still too young, still not old enough to die?
> What if I want to wait until I have experienced life to say good-bye?

The prosecutor also commented during rebuttal argument:

> [W]e want a verdict that at least holds those accountable who took that life before its time.
>
> [Defense counsel] said well there is nothing you can do about it. Well, yeah, there is something you can do about it. And you're the only people on earth that can do something about it now. And that at least declares his responsibility for that act that it wasn't some meaningless accident.
>
> And that would be a verdict of guilty as charged. And I think justice requires it.

However, defendant Cole fails to explain how these statements affected his substantial rights. See *Carines, supra* at 763-764. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Considering the prosecutor's comments in context, it does not appear that they amounted to plain error affecting his substantial rights. *Carines, supra* at 763-764. Consequently, defendant Cole has not proven that his trial counsel's failure to object amounted to ineffective assistance. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

2. Defendants Holtschlag, Brayman, and Limmer

Similarly, Defendants Holtschlag, Brayman, and Limmer maintain that the prosecution made prejudicial comments before their jury during closing argument. Indeed, the prosecution also read Samantha's poem to their jury. However, after reading this poem he made the following remarks:

> Poor Samantha when she . . . wrote that, no way she could have known how close the end was to her and how it would be brought about by the people close to her, by the people that she trusted, by the people that was around her.
>
> You know, if we could have a perfect justice system, I'd ask for a verdict that would restore her life. But we can't do that. But we can do the next best thing and that's at least ask you to do justice in your verdict.
>
> And if Samantha's watching us somewhere, I want us to be proud of that verdict. And that verdict is going to say loud and clear to these defendants that the day for accountability is here. You have been ducking it every since January the 17th and it's over. And that is a verdict that declares them responsible for the acts that they committed.

According to these defendants, the only purpose behind reading Samantha's poem and the "poor Samantha" sentiment was to appeal to the jury's sympathy. Defendants also claim that the prosecution appealed to the jury's sense of civic duty when it told them that while they could never make up for the loss of Samantha, they could do the next best thing and convict defendants. Nevertheless, defendants failed to object to this alleged impropriety during the trial.

The prosecutor's comments and rendition of Samantha's poetry were arguably dramatic. Essentially, the prosecutor told the jury that they should convict defendants because they could not bring Samantha back. However, the fact that the prosecution read a short poem written by the decedent and commented on her youth in the context of a five week trial does not warrant a finding that a miscarriage of justice resulted. The jury was further instructed to decide the case based on the evidence presented and not the attorney's comments. See *Dennis, supra* at 581. Given the substantial evidence of defendants' guilt, we do not find that reversible error occurred. *Carines, supra* at 763-764. Because defendant Brayman cannot prove that the result of the proceedings would have been different but for his trial counsel's failure to object, his ineffective assistance of counsel claims must also fail. *Carbin, supra* at 599-600.

V. New Trial

Defendant Limmer next contends that the trial court erroneously denied his request for a new trial. We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648, n 27; 576 NW2d 129 (1998). A trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B); *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

In the instant case, the trial court did not abuse its discretion when it denied defendant Limmer's motion for a new trial.[10] Indeed, as previously concluded, there was ample evidence to support these convictions. While the trial court considered testimony that was not presented to

[10] However, we note that the trial court abused its discretion when it denied defendant Limmer's motion for new trial on his accessory after the fact to manslaughter charge. Nevertheless, because the conviction for that charge is overturned, this issue is moot. *Rutherford, supra* at 204.

defendant Limmer's jury concerning his possession of GHB, this fails to support a finding that the jury's verdict resulted in a miscarriage of justice warranting a new trial.

VI. Cumulative Error Doctrine

Defendant Brayman asserts that he was denied a fair trial due to the occurrence of numerous errors. We disagree. According to *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001):

> The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal. In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence. In other words, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial. [Citations omitted.]

Aside from improperly charging defendants with involuntary manslaughter, there were only two minor errors: (1) the admission of testimony that defendant Holtschlag sold marijuana; and (2) the prosecutor's appeal to the juror's sympathy for the victim. Given the evidence properly presented, we find that these minor errors did not severely prejudice defendants.

VII. Sentencing

Defendants raise several sentencing errors on appeal. However, because defendants have fully served their minimum sentences for the remainder of their offenses, the sentencing issues raised on appeal are rendered moot.[11] *Rutherford*, *supra* at 204. "Where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot." *Id.*

We affirm in part, reverse in part, and vacate defendants' sentences for involuntary manslaughter and accessory after the fact to manslaughter.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

[11] Defendants' sentences for involuntary manslaughter and accessory after the fact to manslaughter are vacated. We note that defendants have already served their minimum sentences for Mixing a Harmful Substance in a Drink, MCL 750.436(1).